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No. 84- 1572

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

SYLVESTER MARX, Individually, and as shareholder of Centran Corporation, on behalf of Centran Corporation and all others similarly situated,
Petitioner,

vs.

CENTRAN CORPORATION, et al.,
Respondents.

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI To the U.S. Court of Appeals For the Sixth Circuit

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REPLY IN SUPPORT OF
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THE COMPTROLLER OF THE CURRENCY CANNOT BY REGULATION LAWFULLY EXPAND THE INCIDENTAL POWERS NECESSARY TO CARRY ON THE BUSINESS OF BANKING AND LEGITIMATIZE AN ULTRA VIRES ACT OF BORROWING ON LONG TERM GOVERNMENT BONDS PURCHASED SUBSTANTIALLY IN EXCESS OF A NATIONAL BANK´S CAPITAL & SURPLUS, WHERE THE BANK´S PURPOSE IS TO TAKE A SPECULATIVE POSITION IN THE BOND MARKET.

The limit of the authority of a

national bank to borrow to support its purchase of government bonds cannot be expanded by the Comptroller of the Currency beyond the power granted to national banks under 12 U.S.C. 24 Seventh, which grants all such incidental powers as shall be necessary to carry on the business of banking. The limit of borrowing authority cannot be a matter of fashion or whimsey regardless of whether the Comptroller changes his mind as to whether a Repo is construed by him as a borrowing or a purchase.

As pointed out in the Sixth Circuit opinion, at footnote 4 on page A71, the Comptroller currently treats Repos as borrowings as he did prior to 1965 before he enacted 12 C.F.R. 7.1130 and 7.1131, which remain unchanged unless they have been repealed by implication by his latest regulation. These reversals by the Comptroller as to how to treat borrowings is compelling evidence that the agency's

regulation is erroneous and arbitrary. Even the Sixth Circuit is unclear as to the application of the Comptroller's lastest regulation. This purposeful act by the Comptroller is to muddy the water so that national banks can have an arguable basis as in the case at bar to speculate in government bonds.

Additionally, 12 U.S.C. 82, did not delegate the Comptroller any authority to enact these regulations in the first instance. The foregoing are compelling reasons that the Comptroller is wrong and is perpetuating speculation in government bonds. Since the regulations are clearly unsupported by statute, judicial deference to them is inappropriate. See CBS v. FCC, 453 U.S. 367, 390.

It is reassuring to note, as stated on page 8 of Respondent's Brief in Opposition, that, "All the CNB transactions in 1980 were in complete harmony with those

regulations and in accord with the 'Comptroller's Manual for National Banks'", especially when the Comptroller's Manual is not part of the record. It must be supposed that if CNB was in compliance with the Comptroller's Manual in 1981 and 1982, the Respondents would have mentioned it.

The Court must, therefore, conclude that this is a tacit admission by Respondents that the use of short-term repurchase agreements and over-night funds, rolled over on a daily basis for three years, is not an authorized transaction to support CNB's purchase, for its own account, of $307 million of long-term United States, state and municipal bonds.

The real issue of great public importance remains unchanged. The question is: At what point may a national bank disregard its capital and surplus and take a long-term position in United States bonds, using the bonds themselves as the mode of

payment for their own purchase by borrowing thereon and paying interest? It is obvious that if this operation is permitted, a national bank can boot-strap itself into a purchasing situation of U.S. Bonds, unlimited in character. The mystery in this case is why CNB stopped at $307 million in its purchase of the bonds.

12 U.S.C. 1842(d) IS A VIABLE FEDERAL QUESTION SINCE UNDER THE FINANCIAL INSTITUTIONS' SUPERVISORY ACT OF 1966, 12 U.S.C. 1818(b), THE FEDERAL RESERVE BOARD OF GOVERNORS IS EMPOWERED TO INITIATE CEASE AND DESIST PROCEEDINGS IF IT HAS REASONABLE CAUSE TO BELIEVE THAT CENTRAN'S TRANSACTION WITH MARINE MIDLAND BANK ACTUALLY VIOLATED STATE LAW OF OHIO.

The parties stipulated that Centran's transaction with Midland Marine Bank, Inc. was not approved by the Federal Reserve Board of Governors. The prohibition of 12 U.S.C. 1842(d) precludes any bank holding company from acquiring direct or indirect ownership of any bank. "Indirect ownership" requires that formal application

for Board approval is necessary thereunder, especially where it violates the state law of Ohio, which did not authorize out-of-state bank holding companies to come into the State.

These issues have recently been discussed in a case entitled, Huston v. Board of Governors of Federal Reserve System, (C.A. 8), No. 84-1084, March 26, 1985 (no other citation currently available). This case explicitly excluded, in footnote 2, the issue of the Financial Institutions' Supervisory Act of 1966, as it affected its holding that the interstate transaction involving Iowa banks did not require the Federal Reserve Board of Governors approval. The issue of 12 U.S.C. 1842(d) remains unresolved in the case at bar as a Federal question since the Sixth Circuit Court of Appeals failed to reach this issue, and because the Federal Reserve Board of Governors approval was not obtained either under 12 U.S.C. 1842(a) & (d) and/or under 12

U.S.C. 1818(b). Under the circumstances of this case Centran directors were required to seek and obtain such approval since there was reasonable cause to believe Centran, a bank holding company, was about to engage in an "unsafe or unsound practice", or was about to violate "law, rule or regulation" of the state of Ohio.

Thus, a federal question exists if Petitoner's contention is correct, that Centran directors illegally entered into a transaction with Marine Midland Bank, Inc., a holding company, in violation of 12 U.S.C. 1842(d), by failing to get the requisite approval from the Federal Reserve Board of Governors, whereby the Petitioner's stock was diluted. Petitioner has presented this issue under "Questions Presented", number 5, in the Petition for a Writ of Certiorari. This is not a matter of Ohio state law only, but involves the question as to whether Petitioner has any rights for violation of

federal law by Respondents, in consummating a transaction without first obtaining the proper federal approval.

Petitioner contends that Centran transaction with Midland Marine Bank which is part of the record falls within the Federal Reserve Board of Governors guidlines set forth in the Huston case, supra. as to voting rights and indirect control.

OHIO CORPORATE LAW CONTROLS THE INTERNAL AFFAIRS OF CENTRAN.

The facts remain, as the parties stipulated, that Centran does not do any business whatsoever in the state of Delaware. The law is clear in the Sixth Circuit that a corporation such as Centran, which has no contact with the state of its incorporation, Delaware, other than the naked fact of incorporation, is not entitled to the benefit of the corporate law of the state of incorporation. See McCutcheon v. Merz

Capsule Co., 71 Fed. Rptr. 787 (6th Cir.). See also Mansfield Hardwood Lumber Co. v Johnson, 268 F 2d 317, 321 (5th Cir. 1959), cert. denied 361 U.S. 885.

THE SIXTH CIRCUIT OPINION RENDERED SUBSEQUENT TO THE FILING OF THE PETITION FOR A WRIT OF CERTIORARI AND RESPONDENTS BRIEF IS IN APPENDIX.

DIRECTORS WOULD NEVER GIVE UP CONTROL OF THEIR CORPORATION BY ISSUING WARRANTS FOR 37 PERCENT OF THEIR COMMON STOCK FOR 70 MILLION DOLLARS UNLESS THEY WERE IN SERIOUS TROUBLE.

ARMSTRONG v. CHEMICAL NATIONAL BANK OF NEW YORK, 83 Fed. Rptr. 556 AT PAGE 566 STATED:

> "The court concedes that among the incidental powers necessary to carry on the banking business, is the power, under certain circumstances temporarily to borrow money....."

Immediately preceding Page 566, the Court stated:

> "A national bank can exercise, by its board of directors, or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking, by discounting and negotiating

promissory notes, drafts, bills of exchange and other evidences of debt; by receiving deposits; by buying and selling exchange, coin and bullion; by loaning money on personal security and by obtaining, issuing and circulating notes, The power to borrow money or to give notes is not expressly given by the act. The business of the bank is to lend, not to borrow money; to discount the notes of others, not to get its own notes discounted. Still, as was said by this court in the case of First Nat. Bank v. National Exch. Bank, 92 U.S. 122, 127, 'authority is thus given in the act to transact such a banking business as is specified, and all incidental powers necessary to carry it on are granted. These powers are such as are required to meet all the legitimate demands of the authorized business and to enable a bank to conduct its affairs within the general scope of its charter, safely and prudently. This necessarily implies the right of a bank to incur liabilities in the regular course of its business, as well as to become the creditor of others.' Nor do we doubt that a bank, in certain circumstances may become a temporary borrower of money."

Borrowing for three years is not "temporary"!

EDITOR'S NOTE

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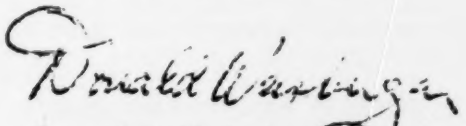
Respectfully Submitted,



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No. 83-3602

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JOHN P. HEHMAN, Clerk

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

SYLVESTER MARX,

Plaintiff-Appellant,

vs.

CENTRAN CORPORATION, et al.,

Defendants-Appellees.

ORDER

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court. This notice is to be prominently displayed if this decision is reproduced.

Before: MARTIN, JONES and CONTIE, Circuit Judges.

A series of motions are now before the court, each owing to the death of plaintiff Sylvester Marx. The Appellees move for the substitution of Donald Marx, Executor of the Estate of Sylvester Marx, as party plaintiff. They also move for an order holding the estate liable for all costs charged against Sylvester Marx prior to his death and for all costs which may be charged against the plaintiff in future proceedings. Finally, they move that this court dismiss the derivative claims due to a lack of standing on the part of Marx's executor. The Appellant also moves for substitution of Donald Marx as Executor. In addition, it moves for an order compelling the reissue of the 200 shares of Centran stock in the name of Sylvester Marx and the delivery of the stock certificate to Donald Marx, Executor. Finally, Appellant moves for disallowance of court costs previously allowed to Appellees as a sanction for the perceived bad faith of the Appellees. We

We have previously granted Appellant's motion to stay our mandate until April 4, 1985.

First, as to the substitution of Donald Marx, Executor, both parties have moved for his substitution and substitution is appropriate under Federal Rule of Appellate Procedure 43(a). Accordingly, Donald Marx, Executor of the Estate of Sylvester Marx will be substituted as party plaintiff.

The Appellees' motion as to costs is not properly before us. The appropriate forum for determining whether the estate is liable for costs already incurred is the probate court presiding over the estate. The Appellees must submit their claim for costs like any other creditor of the decedent. The request as to future costs presumes that costs will someday be awarded against the estate and that the estate will for some reason contend that it is not liable. Since federal courts do not render advisory opinions, we decline to grant this motion.1/

The Appellant's motion to compel the reissue of the shares of stock presents a fact-bound question not litigated below and not within the scope of the pleadings. It is in addition a matter of state law. Since the question has not been litigated below, since its resolution depends on facts which we are not equipped to determine and since it is a matter of state law, we believe that it could best be resolved in either the probate court or a separate state court action for declaratory or injunctive relief.

1/ To avoid possible confusion, we note that our denial of these motions does not mean that the estate is not liable for costs. Rather, we decline to address the two related questions.

The Appellees' motion to dismiss need not be decided by this court since we have already affirmed the dismissal of the derivative claims on the merits. Appellees will have an adequate opportunity to make their argument regarding standing in their response to Appellant's petition for certiorari and, if certiorari is granted, in their brief on the merits to the Supreme Court. See Supreme Court Rule 22.1 (brief in opposition to petition for certiorari may present "any matter or ground why the cause should not be reviewed").

Finally, we find no basis for disallowing the costs previously imposed. The Appellant's motion to disallow costs previously granted will therefore be denied.

The motions to substitute Donald Marx, Executor of the Estate of Sylvester Marx, are hereby GRANTED. All other motions are DENIED.

ENTERED BY ORDER OF THE COURT

John P. Hehman
Clerk

12 U.S.C. § 1818

(b)(1) If, in the opinion of the appropriate Federal banking agency, any insured bank, bank which has insured deposits, or any director, officer, employee, agent, or other person participating in the conduct of the affairs of such a bank is engaging or has engaged, or the agency has reasonable cause to believe that the bank or any director, officer, employee, agent, or other person participating in the conduct of the affairs of such bank is about to engage, in an unsafe or unsound practice in conducting the business of such bank, or is violating or has violated, or the agency has reasonable cause to believe that the bank or any director, officer, employee, agent, or other person participating in the conduct of the affairs of such bank is about to violate, a law, rule, or regulation, or any condition imposed in writing by the agency in connection with the granting of any application or other request by the bank or any written agreement entered into with the agency, the agency may issue and serve upon the bank or such director, officer, employee, agent, or other person a notice of charges in respect thereof. The notice shall contain a statement of the facts constituting the alleged violation or violations or the unsafe or unsound practice or practices, and shall fix a time and place at which a hearing will be held to determine whether an order to cease and desist therefrom should issue against the bank or the director, officer, employee, agent, or other person participating in the conduct of the affairs of such bank. Such hearing shall be fixed for a date not earlier than thirty days nor later than sixty days after service of such notice unless an earlier or a later date is set by the agency at the request of any party so served. Unless the party or parties so served shall appear at the hearing personally or by a duly authorized representative, they shall be deemed to have consented to the issuance of the cease-and-desist order. In the event of such consent, or if upon the record made at any such hearing, the agency shall find that any violation or unsafe or unsound practice specified in the notice of charges has been established, the agency may issue and serve upon the bank or the director, officer, employee, agent, or other person participating in the conduct of the affairs of such bank an order to cease and desist from any such violation or practice. Such order may, by provisions which may be mandatory or otherwise, require the bank or its directors, officers, employees, agents, and other persons participating in the conduct of the affairs of such bank to cease and desist from the same, and, further, to take affirmative action to correct the conditions resulting from any such violation or practice.

(2) A cease-and-desist order shall become effective at the expiration of thirty days after the service of such order upon the bank or other person concerned (except in the case of a cease-and-desist order issued upon consent, which shall become effective at the time specified therein), and shall remain effective and enforceable as provided therein, except to such extent as it is stayed, modified, terminated, or set aside by action of the agency or a reviewing court.

(3) This subsection and subsections (c) through (f) and (h) through (n) of th section shall apply to any bank holding company, and to any subsidiary (other than bank) of a bank holding company, as those terms are defined in the Bank Holdi Company Act of 1956 [12 U.S.C.A. 1841 et seq.], and to any organization organiz and operated under section 25(a) of the Federal Reserve Act [12 U.S.C.A. 611 et se or operating under section 25 of the Federal Reserve Act [12 U.S.C.A. 601 et seq.], the same manner as they apply to a State member insured bank. Nothing in th subsection or in subsection (c) of this section shall authorize any Federal bankin agency, other than the Board of Governors of the Federal Reserve System, to issue notice of charges or cease and desist order against a bank holding company or a subsidiary thereof (other than a bank or subsidiary of that bank).

(4) This subsection and subsections (c), (d), (h), (i), (k), (*l*), (m), and (n) of th section shall apply to any foreign bank or company to which subsection (a) of secti 3106 of this title applies and to any subsidiary (other than a bank) of any su foreign bank or company in the same manner as they apply to a bank holdi company and any subsidiary thereof (other than a bank) under subparagraph (3) this subsection. For the purposes of this paragraph, the term "subsidiary" sh have the meaning assigned to it in section 2 of the Bank Holding Company Act 1956 [12 U.S.C.A. 1841].

(5) This section shall apply, in the same manner as it applies to any insured ba for which the appropriate Federal banking agency is the Comptroller of the Curr cy, to any national banking association chartered by the Comptroller of the Curr cy, including an uninsured association.